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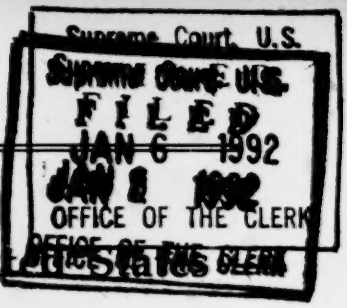

In The

Supreme Court of the United States

October Term, 1991

JOHN B. LENNES, JR., COMMISSIONER OF THE DEPARTMENT OF LABOR AND INDUSTRY, STATE OF MINNESOTA,

and

MINNESOTA MECHANICAL CONTRACTORS ASSOCIATION,

Petitioners,

v.

BOISE CASCADE CORPORATION, A DELAWARE CORPORATION, BE&K CONSTRUCTION COMPANY, A DELAWARE CORPORATION, CHARLES L. LEE, RELCO UNISYSTEMS CORPORATION, A MINNESOTA CORPORATION, FORREST DAHMES, MID-STATES MECHANICAL SERVICES, INC., A MINNESOTA CORPORATION, AND KRISTINE SOUTHARD,

Respondents.

Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Eighth Circuit

REPLY BRIEF OF PETITIONERS

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INTRODUCTION

Petitioners submit this Reply Brief in support of their Petition for a Writ of Certiorari for two reasons:

(1) to clarify, contrary to Respondents' argument, that the job site ratio rule that the Eighth Circuit struck down in this case is qualitatively similar to other state or local occupational licensing laws and, therefore, the lower court's ERISA preemption holding has sweeping implications; and

(2) to alert the Court to three new court decisions, handed down since the petition in this case was filed, reflecting three conflicting approaches to the issue of ERISA preemption of state training and apprenticeship requirements and demonstrating the need for this Court to decide the issue.

ARGUMENT

I. THE RULING BELOW PLACES STATE OCCUPATIONAL LICENSING LAWS AND OTHER PUBLIC SAFETY REGULATIONS IN JEOPARDY AND IS SUFFICIENTLY SIGNIFICANT TO MERIT SUPREME COURT REVIEW.

A. Licensing Laws Are Jeopardized.

Respondents erroneously contend that the decision of the Eighth Circuit was narrow and carries no implications for the validity of other state occupational licensing laws or local public safety regulations. But that contention grossly understates the potential reach of the decision below. Because of its broad-ranging impact, this case merits plenary review by this Court.

The state regulation in question here is a simple one. Minnesota law generally requires everyone working on

high-pressure pipefitting projects to meet minimum educational and experience requirements and carry a license. Minn. Stat. § 306.48, subd. 1 (1990). In this way, Minnesota's licensing law is no different than numerous other state and local licensing laws throughout the country. Minnesota's pipefitting regulations, however, allow contractors to use unlicensed workers as well, provided that for the first unlicensed worker, there is at least one other pipefitter on the job site with a license and, for every unlicensed worker after that, there are at least three licensed pipefitters working at that job site project. Minn. Rules pt. 5230.0110 (1991).[1]

This is all that Minnesota requires. The State does not require that unlicensed workers be enrolled in an "approved" apprenticeship or training program (or indeed any training program at all). Nor does Minnesota in any way monitor the quality of the experience they gain or the "on-the-job training" they receive. This simple "ratio requirement" was held preempted below under the Employee Retirement Income Security Act (ERISA), 29 U.S.C. § 1144(a) (1988), on the grounds that it purportedly "related to" employer apprenticeship or training plans.

Respondents claim that the change in nomenclature of these unlicensed workers from "apprentices" to "trainees" in the new regulations reflects an illicit purpose to regulate training. But this slight semantic change does not justify a determination of ERISA preemption. Regardless of these labels, Minnesota's pipefitting "ratio

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[1] Minnesota also asks that these unlicensed workers register with the state department of labor and industry to assure that the State has some record of their experience. *Id.*

requirement" has no more effect on employer apprenticeship and training plans than other occupational licensing provisions. Most licensing laws do not permit employers to use unlicensed "apprentices" or "trainees" at all. If the Minnesota job site rule "relates to" ERISA plans, as Respondents maintain, every occupational licensing law in the country could be suspect. The holding of the court below may be viewed as giving employers the ability, under ERISA, to use as many unlicensed, unqualified employees as they wish on a work project, as well as unfettered capability to set the terms and conditions of employment for employees they designate as "trainees" or "apprentices" without regard to the broader public interest, as evinced by state or local regulatory or legislative measures. Under this reasoning, state and local regulatory bodies are prevented from using their traditional police powers to protect the public health and safety.

B. The Interests Are Significant.

Because of the broad potential impact on state regulatory mechanisms, this case is of substantial concern to the states, the federal government, and this Court.

The interest of the states is clear. On their behalf, the National Association of Attorneys General (NAAG) unanimously endorsed a resolution last June decrying ERISA preemption attacks on state laws governing occupational licensing and apprenticeship standards, among other measures. *See* attached Supplemental Appendix A.

The NAAG resolution, reflecting the views of the top law enforcement officials throughout the country, provides: "ERISA was intended to protect employees from abuse and mismanagement of employee benefit plans and to protect them from failure to pay promised benefits," but "due to a series of adverse federal court decisions construing ERISA's preemption provision more broadly than Congress originally intended, ERISA has become a tool for employers who wish to avoid their obligations under state law."

Likewise, the Federal government has an important concern in the resolution of this matter. The Bush administration has recently taken the position that ERISA preemption does not extend as far as the Eighth Circuit holds. The Secretary of Labor and the Secretary of Health and Human Services have jointly told the House Subcommittee on Labor-Management Relations in a September 24, 1991 letter, *see* attached Supplemental Appendix B, that there is no need for proposed legislation clarifying that ERISA does not preempt state training laws. The administration position as stated in that letter is that:

> Under H.R. 2782, state laws relating to apprenticeship or other training programs would not be preempted by ERISA. Such programs that are maintained by employers or employee organizations are expressly identified as employee benefit plans under ERISA. *ERISA's preemption provisions, however, do not prevent states from making training an occupational qualification or from establishing minimum standards for such training.*

(Emphasis added.)

Therefore, the circuit court decision at issue here is contrary to the position of the States, as well as the views of the executive branch of the federal government. These concerns fortify the justification for review and resolution of the ERISA preemption issue by this Court.

II. THE LOWER COURTS ARE IN CONFLICT OVER THE SCOPE OF ERISA PREEMPTION OF STATE LAWS AFFECTING APPRENTICESHIP AND TRAINING PLANS, AND THIS COURT SHOULD RESOLVE THOSE DIFFERENCES.

If this Court decides that the Minnesota regulation does, in fact, "relate to" ERISA apprenticeship and training programs, it also must decide whether the regulation is nevertheless saved from ERISA preemption because of the National Apprenticeship Act (Fitzgerald Act), 29 U.S.C. § 50 (1988), and its regulations. As the Petition explained, the Fitzgerald Act regulations actively encourage and specifically require the kind of "ratio requirement" Minnesota applies to pipefitting projects. Therefore, the court below erred in not considering the effect of the Fitzgerald Act before holding that ERISA preempted the Minnesota job site ratio rule.

Since the Petition for a Writ of Certiorari was filed in this case, at least three more courts have addressed the question whether the Fitzgerald Act saves state apprenticeship rules from ERISA preemption. Each court took a different view, illustrating both the practical and doctrinal confusion that exists.

First, in *Electrical Joint Apprenticeship Committee v. MacDonald*, No. 90-15095 (9th Cir. November 8, 1991), the

Ninth Circuit enjoined the Nevada Labor Commissioner from enforcing the apprenticeship component of Nevada's prevailing wage law on ERISA preemption grounds. Like several other states, Nevada requires public works contractors to establish or join particular apprenticeship programs, which go well beyond the requirements of regulations promulgated under the Fitzgerald Act.[2] The court held that ERISA preempted the Nevada law, but its ruling was quite narrow. The court emphasized that the Nevada rule was preempted because it was "independent and apart from the regulation authorized and provided for by the Fitzgerald Act and its accompanying regulations." *Id.* at 15249. Unlike Nevada's regulation, Minnesota's ratio requirement is expressly authorized by the Fitzgerald Act regulations. Under the Ninth Circuit's analysis, the Minnesota rule would not be preempted by ERISA.

In contrast, in *Southern California Chapter of Associated Builders and Contractors, Inc. (ABC) Joint Apprenticeship Committee v. California Apprenticeship Council*, No. A049486 (Cal. Ct. App., 1st Dist., December 3, 1991), a state appeals court held that ERISA preempted any state effort to withhold approval of apprenticeship programs, and, like the Eighth Circuit in this case, did so on the broadest possible grounds. Expressing "some reluctance to so hold," the court acknowledged that "the arguable

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[2] In contrast to the Nevada rule enjoined in *Electrical Joint Apprenticeship Committee*, Minnesota does not require public works contractors to create or join particular apprenticeship systems.

logical consequence" of its holding was that "all of California's laws regulating apprenticeship . . . would be preempted also," and that "such a result would allow only federal authorities to promulgate standards for apprenticeship programs, and strip [the states] of any function, except as [they] may advise upon and enforce applicable federal laws and regulations." *Id.*, slip op., at 11. The court added that Congress could amend ERISA "if this result is, as we suspect, unintended," but concluded that it had to follow what it perceived to be the weight of the authority. *Id.*, slip op., at 11.

Finally, in *Dillingham Construction v. County of Sonoma*, No. 90-1272 (N.D. Cal. December 11, 1991), a federal district court took yet a third view. The court in *Dillingham* upheld California's minimum employment standards for apprentices, on the grounds that they were consistent with the "purposes" of the Fitzgerald Act. The court reasoned:

> The State approval requirement insures the integrity of apprenticeship programs and protects the public and would-be apprentices from fraudulent programs which result in inadequately trained or abandoned apprentices. The court finds that this purpose falls squarely within the state's delegated jurisdiction under the Fitzgerald Act as articulated in the Fitzgerald Act itself and in its regulations.

Id., slip op., at 7. The court in *Dillingham* cited the Eighth Circuit decision in this case as contrary authority, *Id.* at 7, n. 8, but criticized the Eighth Circuit Court's ruling for not considering the effect of the Fitzgerald Act on the ERISA preemption question.

There are, therefore, at least three divergent viewpoints expressed by various courts on the proper scope of ERISA preemption over state regulations that "relate to" apprenticeship and training plans. The Eighth Circuit and the California Court of Appeals have held that ERISA preempts virtually all state apprenticeship and training regulations. The Ninth Circuit's position is that ERISA precludes only those state rules that are not expressly "authorized and provided for by the Fitzgerald Act and its accompanying regulations," which would, if applied here, validate the Minnesota ratio rule. But the Federal District Court in San Francisco takes the view consistent with the position here of Petitioners: that ERISA cannot preempt state regulations that are consistent with the purposes of the Fitzgerald Act, as is the 3:1 job site ratio at issue in this case.

This growing divergence of views, supports the need for acceptance of appellate review by this Court and resolution of the burgeoning conflict that has developed below.

CONCLUSION

For the reasons stated above, and in the original petition, the State of Minnesota and the Minnesota Mechanical Contractors' Association request that their petition for a Writ of Certiorari be granted.

Respectfully submitted,

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APPENDIX A

NATIONAL ASSOCIATION OF ATTORNEYS GENERAL

Adopted

Summer Meeting
June 23-26, 1991
Seattle, Washington

RESOLUTION

ERISA PREEMPTION

WHEREAS, the Employee Retirement Income Security Act of 1974, (ERISA) was intended to protect employees from abuse and mismanagement of employee benefit plans and to protect them from failure to pay promised benefits; and

WHEREAS, due to a series of adverse federal court decisions construing ERISA's preemption provision more broadly than Congress originally intended, ERISA has become a tool for employers who wish to avoid their obligations under state law; and

WHEREAS, Congress has under consideration the ERISA Preemption Amendments of 1991, S. 794, which would curtail ERISA preemption attacks on state laws governing unfair insurance practices, prevailing wages, apprenticeship standards, and occupational licensing, and direct the Secretary of Labor to complete a study on the other effects of ERISA preemption.

NOW, THEREFORE, BE IT RESOLVED THAT THE NATIONAL ASSOCIATION OF ATTORNEYS GENERAL:

1) supports the passage and enactment of the ERISA Preemption Amendments of 1991; and

2) directs its Executive Director and General Counsel to establish a Working Group on ERISA Preemption to continue surveying and evaluating the problems in this area and report back to the Association at its Winter Meeting; and

3) directs its Executive Director and General Counsel to transmit this resolution of support to President Bush, Secretary of Labor Martin, the Congress, and other interested organizations.

Abstains: Generals Lungren and Norton

APPENDIX B

U.S. DEPARTMENT OF LABOR

SECRETARY OF LABOR
WASHINGTON, D.C.

SEP 24 1991

The Honorable Pat Williams
Chairman
Subcommittee on Labor-Management Relations
Committee on Education and Labor
U.S. House of Representatives
Washington, D.C. 20518

Dear Chairman Williams:

It is our understanding that your subcommittee will soon begin markup of H.R. 1602 and H.R. 2782. These bills were intended to overrule a number of federal and state court holdings applying the federal preemption prevision contained in section 514 of the Employee Retirement Income Security Act of 1974, as amended ("ERISA"). For the reasons set forth below, and in the enclosed report, the Department of Labor and the Department of Health and Human Services strenuously oppose enactment of the legislation. If these bills were presented to the President, we would recommend that he veto the legislation.

Congress enacted ERISA in 1974 to establish a comprehensive federal regulatory and enforcement scheme applicable to qualified employee benefit plans. Congress deliberately included a detailed federal preemption provision placing the principal regulatory authority in the hands of the federal government. That preemption provision states that ERISA, with certain exceptions, including

an exception for state laws which regulate insurance, security and banking, "shall supersede any and all State laws insofar as they may now or hereafter *relate to* any employee benefit plan. . . . " (emphasis added).

For 17 years, ERISA preemption has provided a uniform national mechanism for achieving the statutory objective of equitably governing benefit plans and remedying benefit plan abuses. That uniformity has provided the predictability necessary to encourage employers to establish and continue to maintain employee benefit plans voluntarily. The need for federal uniformity assumes ever greater importance as the competitive pressure of the "national economy" of the 1970's relinquishes ground to that of the "global economy" of the 1990's.

The proposed legislation focuses on four recent federal and state court decisions. Those decisions found that certain provisions of state law regarding insurance company benefit claim practices, prevailing wage provisions relating to employee benefit requirements for public contracts, requirements for apprenticeship training plans maintained by employers bidding on public contracts, and remedies for collection of contributions to multiemployer pension and welfare plans, "relate to" employee benefit plans. Consistent with the ERISA statute, the courts found that those provisions of state law are preempted.

After careful consideration of the proposed Legislation, we believe that any speculative remedial benefits anticipated by the bill's sponsors would be far outweighed by the tremendous damage the legislation would do to the law governing employee benefit plans.

We are particularly concerned about the provisions of H.R. 1602 which would allow states to provide additional remedies for alleged unfair benefit claims practices by insurance companies. Remedies such as punitive and consequential damages will stimulate unnecessary litigation and will result in higher costs for insured health care plans. Most importantly, implementation of managed care and other arrangements designed to deal with our national problem of skyrocketing health care costs would be chilled by the prospect of lawsuits seeking consequential or punitive damages when a particular treatment is denied.

The problem of rising health care costs is an issue for all employers, particularly small businesses, and the nation as a whole. At a time when the Administration is struggling to find ways to address the problems of access to affordable health care, it seems counterproductive to add to the cost of insured plans, which are typically the only types of plans feasible for small businesses.

These bills purportedly address "problems" that have not been substantiated, and that certainly do not warrant such drastic legislative solutions. The bills give the states wide authority to regulate essential aspects of employee benefit plans. Such a change is in direct conflict with ERISA's intended purpose: uniform federal regulation of employee benefit plans voluntarily established by employers for their employees.

We thus oppose H.R. 1602 and H.R. 2782 because we believe, as drafted, the bills would undermine a fundamental and desirable feature of ERISA, namely, uniform federal regulation of employee benefit plans.

The Office of Management and Budget advises that there is no objection to the presentation of this report from the standpoint of the Administration's program and that enactment of this legislation would not be in accord with the President's program.

Sincerely,

/s/ Lynn Martin
LYNN MARTIN
Secretary of Labor

/s/ Louis W. Sullivan
LOUIS W. SULLIVAN, M.D.
Secretary of Health and Human Services

Enclosure

ADMINISTRATION POSITION ON H.R. 1602/H.R. 2782
ERISA PREEMPTION LEGISLATION

H.R. 1602 and H.R. 2782, as drafted, would impose inappropriate limits on ERISA's preemption provisions. Since the enactment of ERISA, these provisions have preserved a Uniform federal approach to the regulation of employee benefit plans. The broad exceptions created by the bills would endanger ERISA's statutory scheme by resurrecting the threat of conflicting or inconsistent state and local regulation of plans. Below is a summary of our position on each of the four areas where the bills would limit the reach of ERISA preemption.

A. State Insurance Claims Laws

H.R. 1602 would amend ERISA to allow states to provide remedies for alleged unfair benefit claims practices by insurance companies. This could include private lawsuits

seeking unlimited consequential and punitive damages. Under current law such state laws are preempted. ERISA provides uniform remedies for plan participants and plan fiduciaries against insurers who arbitrarily deny pension or welfare benefit claims. The proposals would give plan participants and fiduciaries different rights of action depending upon the state in which they were able to seek relief. These differences would almost certainly yield inconsistent or even conflicting benefit decisions within a given plan. H.R. 1602 also would modify current law, under which remedies available to participants of self-insured plans are identical to remedies available to participants of insured plans, by authorizing expanded state remedies against only "insurance companies and insurers." We are unaware of any factual support for the change H.R. 1602 proposes, and accordingly, support current law.

Availability of additional remedies, such as punitive or consequential damages, will have multiple adverse consequences. We believe that the pecuniary remedies available under current law are adequate to protect the interests of participants. New liabilities would result in higher costs for the maintenance of plans and would discourage plan formation. If enacted, this bill would interfere with benefits claims processing, encourage litigation, and add to the costs of providing benefits. Most importantly, implementation of managed care and other arrangements designed to deal with our national problem of skyrocketing health care costs would be chilled by the prospect of lawsuits seeking consequential or punitive damages when a particular treatment is denied. The problem of rising health care costs is an issue for all

employers, particularly small businesses, and the nation as a whole. At a time when we are all struggling for ways to address the problems of access to affordable health care, it seems counterproductive to add to the cost of insured plans, which are typically the only types of plans feasible for small businesses.

B. State Prevailing Wage Laws

H.R. 2782 proposes to exempt from preemption "any state law providing for the payment of prevailing wages." Many states require public works contractors to pay wages and fringe benefits at levels consistent with locally prevailing levels for such compensation. We believe that the language of the bill is too broad.

This exemption would give the States unfettered discretion to fashion unrelated prevailing wage laws so as to determine, in detail, not only the required types of fringe benefits, but also the terms and conditions under which they must be provided. Although the bills are intended merely to protect the so-called "little Davis-Bacon" laws, they may result in prohibitive administrative costs on contractors who seek to operate in multiple jurisdictions. They could provide a vehicle for states to mandate specific benefits through their "little Davis-Bacon" laws. This was not the intent of Davis-Bacon legislation, and the Administration opposes any attempt to excessively regulate employee benefits.

It is important to acknowledge that the court decisions which have motivated these bills have rendered relatively narrow holdings. They have invalidated only those portions of state "little Davis-Bacon" laws which required

certain types of fringe benefits be provided at certain levels. The general prevailing wage components of these laws have been unaffected by the rulings.

C. State Apprenticeship and Training Laws

Under H.R. 2782, state laws relating to apprenticeship or other training programs would not be preempted by ERISA. Such programs that are maintained by employers or employee organizations are expressly identified as employee benefit plans under ERISA. ERISA's preemption provisions, however, do not prevent states from making training an occupational qualification or from establishing minimum standards for such training.

The bills, however, go much further and would permit states to require that employers contribute to and participate in state-approved programs. Such mandated benefits impose costs on employers and limit their flexibility in selecting alternate means to assure a trained work force. Moreover, inconsistent state apprenticeship training requirements would penalize employers who operate in multiple jurisdictions.